2004

State of Utah v. Luis Perez-Llamas : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 20041084-CA**
v.	:	
LUIS PEREZ-LLAMAS,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONDITIONAL GUILTY PLEA TO POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE IN THE PRESENCE OF A PERSON UNDER 18, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1) (a) (iii), -(4)(a)(x), (WEST 2004), IN THE FOURTH JUDICIAL DISTRICT COURT, JUAB COUNTY, THE HONORABLE STEVEN L. HANSEN PRESIDING

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IN THE UTAH COURT OF APPEALS

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v.	:	
LUIS PEREZ-LLAMAS,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a conditional guilty plea to possession of marijuana with intent to distribute in the presence of a person under 18, a second degree felony, in violation of UTAH CODE ANN. § 58-37-8(1)(a)(iii), -(4)(a)(x) (West 2004), in the Fourth Judicial District Court, Juab County, the Honorable Steven L. Hansen presiding.[1]

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

The sole issue on appeal is:

Whether the trial court abused its discretion in denying defendant's motion to suppress evidence where the officer's search of defendant's van was supported by probable cause, exigent circumstances, and defendant's voluntary consent?

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[1] Citations are made to Utah Code Annotated (West 2004), although the offense was committed in October 2003. Although amendments to section 58-37-8 were made after the offense was committed and are reflected in the current Code, they are not relevant to this case. *See* 2005 Utah Laws pp. 182-85.

The appellate court reviews the district court's factual findings underlying its denial of a defendant's motion to suppress under a clearly erroneous standard. *See State v. Callahan*, 2004 UT App 164, ¶ 5, 93 P.3d 103. "In contrast, we review 'the trial court's conclusions of law based on such facts under a correctness standard, according no deference to the trial court's legal conclusions.'" *State v. Duran*, 2005 UT App 409, ¶ 10, 535 Utah Adv. Rep. 42 (quoting *State v. Anderson*, 910 P.2d 1229, 1232 (Utah 1996)). "In addition, '[b]ecause this case involves a search and seizure, we do not extend any deference to the trial court in its application of the law to its factual findings.'" *Id.* (citing *State v. Alverez*, 2005 UT App 145, ¶ 8, 111 P.3d 808 (quoting *State v. Brake*, 2004 UT 95, ¶ 15, 103 P.3d 699)).

CONSTITUTIONAL PROVISION AND STATUTES

The following constitutional provision and statutes are attached at Addendum A:

Amendment IV to the United States Constitution;
UTAH CODE ANN. § 41-6-55 (West 2004);
UTAH CODE ANN. § 58-37-8 (West 2004).

STATEMENT OF THE CASE

Defendant was charged by information with possession of marijuana with intent to distribute in the presence of a person under 18, a second degree felony, in violation of UTAH CODE ANN. § 58-37-8(1)(a)(iii) & 4 (x) (West 2004) (R. 1). Following a preliminary hearing, defendant filed a motion to suppress, which was denied (R. 24-17, 73-69). Defendant then sought permission from this Court to file an interlocutory appeal, which was also denied (R. 102-95, 105). Thereafter, defendant entered a conditional plea to the charged offense (R. 202:8). The trial court sentenced defendant to a prison term of one-to-fifteen years, which

it suspended, ordering that defendant serve 365 days in the Juab County Jail (R. 146; 203:19, 21).[2]

Following imposition of sentence, defendant filed an application for a certificate of probable cause with the trial court, seeking a stay of the sentence pending appeal. The application was denied (R. 141-128; 203:34-35). Defendant filed a timely notice of appeal (R. 143). He also filed an application for a certificate of probable cause with this Court, which was also denied. *See Perez-Llamas v. Utah Court of Appeal*, 2005 UT 18, ¶ 1, 110 P.3d 706. Thereafter, defendant filed a petition for extraordinary relief with the Utah Supreme Court, asking it to direct this Court, pursuant to rule 27(e) of the Utah Rules of Criminal Procedure, to hold an oral hearing on his probable cause motion (R. 193). *Perez-Llamas*, 2005 UT 18, ¶ 6. The petition was denied. *Id.* at ¶ 15.

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[2] The judgment and sentence appear to be inaccurately stated given the offense defendant pleaded guilty to. The judgment states that defendant was sentenced on a conviction for possession of a controlled substance with intent to distribute, a second degree felony (R. 147). The sentencing proceedings reflect the same offense with the same level of punishment (R. 203:18). Possession of a controlled substance (marijuana) with intent to distribute, without any aggravating circumstance, is a third degree felony. *See* section 58-37-8 (1)(a)(iii), -(1)(b)(ii). The guilty plea, however, clearly reflects that defendant pleaded guilty to possession of a controlled substance with intent to distribute in the presence of a person under 18 (R202:3, 13). That offense is a second degree felony. *See* section 58-37-8 (4)(a)(x), -(4)(c). Given defendant's plea, the lack of anything in the record to indicate that the trial court, defendant, and the prosecutor discussed a modification of the judgment and sentence, and the apparent intent to sentence defendant on a second, rather than third, degree felony, this Court might consider a remand to conform the judgment to the intent of the parties if defendant's conviction is upheld. *See State v. Lorrah*, 761 P.2d 1388, 1390 (Utah 1988) ("clerical errors . . . may be corrected at any time").

STATEMENT OF THE FACTS[3]

Traffic violation

On October 14, 2003, Sergeant Mangelson of the Utah Highway Patrol saw the van defendant was riding in traveling in the left lane of I-15. Sergeant Mangelson also saw three cars pass the van in the right lane. Because the driver of the van failed to pull into the right lane to allow the cars to pass, Sergeant Mangelson stopped the van for a left-lane violation (Findings of Fact, Conclusions of Law and Order, "Findings," and "Conclusions," R73-69, at 73; 200:7-8, 23-24; 201:11, 54).[4] The driver of the van, Reuben Zepeda was cited for impeding the left lane, a violation of UTAH CODE ANN. § 41-6-55 (West 2004), for which he paid a $150 fine, and driving without a license (R. 201:72, 74-75).

Shrink-wrapped tires

When the van stopped, Sergeant Mangelson approached the passenger side of the vehicle (R. 72; 200:8; 201:12). As he did so, he noticed that the van had a temporary Nevada license plate attached with brown tape (R. 200:35; 201:12). Sergeant Mangelson knew that smugglers often purchase new cars to "haul a load of dope" (R. 200:35; 201:12). Sergeant Mangelson also observed two large implement tires that "obviously did not belong to the van" lying in the back of the van (R.72; 200:9-10; 201:13-14). The two tires were shrink-

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[3] The facts are recited in the "'light most favorable to the trial court's findings from the suppression hearing.'" *State v. Comer*, 2002 UT App 219, ¶ 2, 51 P.3d 55 (quoting *State v. Giron*, 943 P.2d 1114, 1115 (Utah Ct. App 1997)).

[4] On direct examination, Zepeda, the driver, denied that any cars passed him, but on cross examination he admitted that it was possible that cars could have passed him without his noticing (R. 201:55, 63).

wrapped which, to the trained officer, "stood out like a neon light," signaling the possibility that defendant was transporting drugs (R. 63, 72; 200:9-10; 201:14, 49). Sergeant Mangelson also saw a roll of shrink wrap and a "piece of cardboard with dried spray foam on it in a circular pattern that appeared to match the circumference of the tire [rims]" (R. 63, 72; 200:11; 201:15, 17-18).

Based on his training, Sergeant Mangelson knew that drug smugglers often package drugs in shrink wrap or spray them with liquid foam to conceal their odor (R. 63, 72; 200:36; 201:14-15). In fact, "every time he ha[d] seen dried spray foam in a vehicle he ha[d] also found illegal narcotics concealed with spray foam" (R. 63; 201:18). On numerous occasions, Sergeant Mangelson had discovered drugs in tires that did not fit the vehicle they were in (R. 72; 200:10; 201:10). Based on his "37 years of experience in drug interdiction and the observations he made in this case he was highly suspicious that the occupants of the van were trafficking illegal narcotics" (R. 63, 72; 201:19).

"How about looking at it, do you mind if I look at it?"

With this suspicion in mind, Sergeant Mangelson asked Zepeda for his driver's license and registration (R. 72; 200:8; 201:16). Zepeda, who was 17 years old, admitted that he only had a training permit and gave the officer his Las Vegas high school identification (R. 72-71; 200:8; 201:16; 204:42:06). Zepeda also stated that the van belonged to defendant, who was in the passenger seat (R. 72; 200:8; 201:16). Sergeant Mangelson questioned the two about where they were going (R. 71; 200:9). Zepeda claimed they were traveling to West Valley to look for work (R. 71; 200:9, 11; 201:16). This response made Sergeant Mangelson more

suspicious because "the young man should have been in school" and neither defendant nor Zepeda had any luggage for a "long trip away from home" (R. 63, 71; 200:9; 201:19).

Sergeant Mangelson questioned the two men about the tires (R. 63, 71; 200:11; 201:17). Defendant spoke little English and Zepeda interpreted (R. 65; 71; 200:11). Neither man could explain why the tires were in the van (R. 63; 200:11; 201:20). Sergeant Mangelson asked if he could look at the tires: "How about looking at it, do you mind if I look at it?" (R. 71; 200:12; 201:20; 204:42:36-38). In response, the two men got out of the vehicle, and defendant voluntarily opened the back door of the van (R. 71; 201:20; 204:42:46-55). Defendant later testified that by opening the back door, he was giving Sergeant Mangelson permission to look at the tires (R. 71; 201:67).

Sergeant Mangelson examined the tires (R. 200:12; 201:20). He pulled on one of the tires and noticed that it was heavy: "[Y]ou could hit your hand on them . . . and it was like they were full of concrete. They were solid. There was no give to them whatsoever" (R. 200:12; 201:20). Sergeant Mangelson went back to his car to retrieve a stethoscope, in order to perform an echo test on the tires (R. 65; 200:14-15; 201:21-22). As he did, defendant began closing the van's doors (R. 65; 201:38, 66). The officer yelled to keep the doors open, returned with the stethoscope, and performed the echo test, which indicated that the tires were solidly packed with something (R. 65; 200:15; 201:22). The officer cut a slit in the shrink wrap and found particles of foam around the tire rim (R. 201:22). During this time, Sergeant Mangelson noticed a "marked change in the demeanor of the individuals. They obviously knew what I was thinking. They were whispering to one another and kicking holes

in the dirt on the road . . . [a]s soon as I started concentrating on these tires" (R. 201:24-25).

As he examined the tires, Sergeant Mangelson continued to question the pair about the tires (R. 65; 200:11; 201:17). This caught Zepeda off guard, "[h]e didn't know exactly what to say" (R. 201:17). He claimed that the tires were for work (R. 200:11; 201:17). Sergeant Mangelson followed up, "Well, how do you use these tires for work?" (R. 201:17). However, Zepeda "basically just didn't have an answer for why they had the[] tires" (R. 201:17).

Almost 40 pounds of marijuana

At this point, concerned for his safety, Sergeant Mangelson decided to have the pair accompany him to the police station in Nephi (R. 200:16-17; 201:25). Zepeda rode with Sergeant Mangleson and defendant followed them in the van (R. 200:16; 201:25). When they arrived at the station, Sergeant Mangelson directed a few other officers to examine the tires (R. 200:17). Defendant and Zepeda were then placed in a holding cell while Sergeant Mangelson took the tires to a tire shop to have them opened up (R. 200:17; 201:26). Sergeant Mangelson "discovered approximately 40 pounds of marijuana concealed inside the tires" (R. 71; 200:17 201:27). Sergeant Mangelson acknowledged that he did not obtain a warrant to search the car (R. 201:45).

SUMMARY OF ARGUMENT

The trial court correctly concluded that the officer's stop of defendant's van was justified by an observed traffic violation. The scope of the ensuing detention was almost immediately expanded when the officer observed over-sized, shrink wrapped tires, apparently

treated with spray foam. Based on his substantial experience with illegal drug transport, and defendant's and the driver's nervous behavior and suspicious responses to questions, the officer quickly developed probable cause to believe that defendant was trafficking in illegal drugs. Defendant also voluntarily consented to the officer's searching the tires. During the search the officer developed even greater probable cause that the tires contained illicit substances. Lastly, because the van was movable and defendant was alerted to the officer's presence, exigent circumstances existed to search the tires, both on the roadside and later at the station house.

ARGUMENT

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE STOP WAS JUSTIFIED AT ITS INCEPTION AND THAT THE OFFICER QUICKLY DEVELOPED PROBABLE CAUSE TO BELIEVE DEFENDANT WAS TRANSPORTING ILLEGAL DRUGS WITHIN THE UNIQUELY WRAPPED TIRES; THE SEARCH WAS JUSTIFIED BY THE EXISTENCE OF EXIGENT CIRCUMSTANCES; ALTERNATIVELY, THE COURT CORRECTLY CONCLUDED THAT DEFENDANT VOLUNTARILY CONSENTED TO A SEARCH OF THE TIRES

Defendant claims that the trial court committed multiple errors in its factual findings and in concluding that his rights under the Fourth Amendment to the United States Constitution were not violated. Aplt. Br. at 16-28. Specifically, he argues that the stop of his van was not genuinely justified by reasonable suspicion of a traffic violation (Aplt. Br. at 10-16); the scope of the stop was unlawfully extended when Sergeant Mangelson asked questions unrelated to the stated purpose of the stop (Aplt. Br. at 16-20); Sergeant Mangelson exploited the illegal stop to obtain defendant's involuntary consent, which was limited to

merely "look[ing] at" the tires (Aplt. Br. at 20-24); defendant revoked his consent when he closed the doors of the van (Aplt. Br. at 26); and no exigent circumstances justified the warrantless search (Aplt. Br. at 26-28). None of these claims has merit.

A. The initial stop of the van was justified because Sergeant Mangelson observed defendant's van impeding the left lane, a violation of Utah law.

Defendant claims that the trial court "clearly erred in finding that the stop of [d]efendant's van by Sergeant Mangelson was based on reasonable, articulable suspicion," because Sergeant Mangelson's "articulated basis for the stop w[as] clearly contradictory and . . . incredible." Aplt. Br. at 11. Specifically, defendant claims that because Sergeant Mangelson "misstated the reason for the stop" on the video tape, his testimony that he stopped the van for a left lane violation "is simply a concoction." Aplt. Br. at 15. Defendant's claim fails because the trial court reasonably credited Sergeant Mangelson's account of the incident, with which Zepeda's description was substantially consistent.

It is well established that "[a]s long as an officer suspects that the 'driver is violating any one of the multitude of applicable traffic and equipment regulations,' the police officer may legally stop the vehicle." *State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).

Here, the record supports the trial court's conclusion that "the initial stop of the van was justified" because "Sergeant Mangelson had a reasonable suspicion to believe a violation of [UTAH CODE ANN.] § 41-6-55 [(West 2004)] occurred" (Findings and Conclusions, R. 73-

69, at 70, attached at Addendum B).[5] *See also* Memorandum Decision, R. 66-60, at 64, attached at Addendum C. Sergeant Mangelson testified that he stopped defendant's van for impeding the left lane (R. 200:8; 201:11). Specifically, Sergeant Mangelson observed defendant's van traveling northbound on I-15. *Id.* While proceeding in the left lane, defendant's van was passed by three cars on the right. *Id.* Although Zepeda testified that no cars passed him while he was driving in the left lane, he also conceded that it was possible that he might not have noticed cars passing him (R. 201: 61). And "[d]efendant concedes that if cars were in fact passing the van on the right, Sergeant Mangelson would have been justified in effectuating the stop." Aplt. Br. at 14.

In support of his claim that Sergeant Mangelson "concocted" his story that he stopped defendant for left-lane violation, defendant cites a portion of the video tape of the traffic stop where Sergeant Mangelson said "'you're going too fast.'" Aplt. Br. at 15 (quoting R.

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[5] Section 41-6-55 provides:

. . . .

(2) On a highway having more than one lane in the same direction, the operator of a vehicle traveling in the left general purpose lane:

> (a) shall, upon being overtaken by another vehicle in the same lane, yield to the overtaking vehicle by moving safely to a lane to the right; and
>
> (b) may not impede the movement or free flow of traffic in the left general purpose lane.

Utah Code Ann. § 41-6-55 (West 2004).

204:4048). Defendant, however, takes this comment out of context. Immediately after telling Zepeda that he was going too fast, Sergeant Mangelson stated, "You're in the inside lane and you need to move over when somebody comes out." (R. 204:4053-4055). In short, the officer apparently misstated himself and then immediately corrected himself. Significantly, Zepeda was cited for the left-lane violation and paid the $150.00 fine (R. 201:74-75).

Further, Zepeda's description of his driving encounter with Sergeant Mangelson partially accords with the officer's rendition. Zepeda testified that he first became aware of the officer's car when it approached him from behind as he (Zepeda) was driving on the *left* side of the highway (R. 201:54, 61). Although the trial court recognized a discrepancy in the testimony about whether Zepeda had been passed by three cars as he drove in the left lane, the trial court credited Sergeant Mangelson's testimony that the van failed to pull to the right to allow the three cars to pass, a violation of section 41-4-55 (R. 64, 70, 73; 200:8; 201:11). *See Bruner v. Carver*, 920 P.2d 1153, 1158 (Utah 1996) (noting that because trial courts are "in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole," appellate courts grant broad discretion to trial courts on such matters). In sum, defendant has failed to show that the court did not properly find and conclude that the stop was justified where the officer personally observed a traffic violation (R. 64, 70, 73).

B. Based on observations made immediately upon viewing the interior of the van, the officer developed not only reasonable suspicion, but probable cause to believe defendant was trafficking in drugs.

Defendant claims that the trial court "erred in finding that the scope of the stop was not unconstitutionally extended when Sergeant Mangelson asked questions unrelated to the stated purpose of the stop." Aplt. Br. at 16. Specifically, defendant argues that "all questions Sergeant Mangelson asked [defendant and Zepeda], except the first two relating to driver's license and registration, were questions that improperly expanded the scope to a level three encounter[,]" because Sergeant Mangelson did not have reasonable suspicion or probable cause to believe that defendant was engaged in criminal activity. Aplt. Br. at 18, 20). Defendant's claim is meritless.

1. Reasonable suspicion.

"[D]uring a traffic stop an officer 'may request a driver's license and vehicle registration, conduct a computer check, and issue a citation.'" *State v. Hansen*, 2002 UT 125, ¶ 31, 63 P.3d 650 (quoting *Lopez*, 873 P.2d at 1132). "Once the purpose of the initial stop is concluded, however, the person must be allowed to depart." *Id.* "Any further temporary detention for investigative questioning after fulfilling the purpose for the initial traffic stop constitutes an illegal seizure, *unless an officer has probable cause or a reasonable suspicion of a further illegality*." *Id.* (internal quotations, citations, and brackets omitted) (emphasis added).

"If the officer reasonably suspects more serious criminal activity, 'the scope of the stop is still limited.'" *State v. Chevre*, 2000 UT App 6, ¶ 10, 994 P.2d 1278 (citation

omitted). "The officer must 'diligently pursue[] a means of investigation that [is] likely to confirm or dispel [his or her] suspicions quickly, during which time it [is] necessary to detain the defendant.'" *Id.* (quoting *State v. Grovier*, 808 P.2d 133, 136 (Utah Ct. App. 1991)).

The Court need not belabor whether the facts, discussed below, show that Sergeant Mangelson reasonably suspected defendant of more serious criminal activity almost immediately into his initial investigation. They do. *See State v. Menke*, 787 P.2d 537, 541 (Utah App. 1990) (reasonable suspicion "must be based on objective facts *suggesting* that the individual *may* be involved in criminal activity") (emphasis added). More importantly, as the trial court concluded, those facts actually demonstrated probable cause (R. 63-62; 70).

2. Probable cause.

"The determination of whether probable cause exists" for a warrantless search of an automobile, as here, "depends upon an examination of all the information available to the searching officer in light of the circumstances as they existed at the time the search was made." *State v. Dorsey*, 731 P.2d 1085, 1088 (Utah 1986) (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). *See also Carroll v. United States*, 267 U.S. 132, 149 (1925) (probable cause is "a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction"). It is "a flexible, common-sense standard[,]" and "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' . . . that certain items may be contraband or stolen property or useful as evidence of a crime[.]" *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Carroll*, 267 U.S. at 162). "[I]t does not

demand any showing that such a belief be correct or more likely true than false." *Id.* Rather, "[a] 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id.* (quoting *Brinegar*, 338 U.S. at 176). In other words, "[t]he process" of calculating probable cause "does not deal with hard certainties, but with probabilities." *Id* (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)). Just as "practical people formulate[] certain common-sense c onclusions about human behavior," so may "law enforcement officers." *Id.* (internal quotation marks and citation omitted). Thus, evidence pointing to probable cause to conduct a warrantless search "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* (internal quotation marks and citation omitted).

Accordingly, the probable cause standard also recognizes that "[p]olice officers by virtue of their experience and training can sometimes recognize illegal activity where ordinary citizens would not." *Dorsey*, 731 P.2d at 1088. Therefore, "[s]ome recognition should appropriately be given to that experience and training where there are objective facts to justify the ultimate conclusion." *Id.* (citations omitted). *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) (recognizing law enforcement officers are allowed "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person") (internal quotation marks and citation omitted). *See also State v. Alverez*, 2005 UT App 145, ¶ 17, 111 P.3d 808 (recognizing validity of probable cause determination is made from

objective standpoint of reasonable officer, including his experience and training) (citation and quotation omitted).

3. The facts support probable cause.

Here, the trial court found that Sergeant Mangelson's observations as he investigated the initial purpose of the stop not only reached the "level of reasonable articulable suspicion," but also established "probable cause of [further] criminal activity" (R. 63). After Sergeant Mangelson stopped the van and approached its passenger side, he noticed two large implement tires, one on seat, the other on the floor toward the rear of the van (R 63; 204:43:08-50). Based on their oversize, the tires obviously did not belong to the van (R. 63, 72; 200:9-10; 201:13-15, 20). The tires, which were shrink wrapped, "stood out like a neon light," immediately suggesting to the officer that they contained illegal drugs. *Id.* As he asked Zepeda for his driver's license and car registration, Sergeant Mangelson observed a roll of shrink wrap and a piece of cardboard that had dried spray foam on it in a circular pattern, which closely matched the size of the shrink-wrapped tires (R63, 72, 201:15, 17). Sergeant Mangelson testified that, it is very common for smugglers to conceal drugs in tires (R. 201:11, 15). And whenever Sergeant Mangelson had seen foam used in vehicles, it was used to hide drugs (R. 63, 72; 201:18). Based on his 37 years of experience in drug interdiction, Sergeant Mangelson was highly suspicious that the tires contained drugs because smugglers wrap drugs in shrink wrap and spray them with liquid foam in order to conceal their odor from officers and police dogs (R. 63, 72; 201:6, 14-15, 17-18). Adding to Sergeant Mangelson's suspicions was that the van was traveling on a known drug route

from a known drug source (R. 63, 71; 201:19). The videotape shows that Sergeant Mangelson made these observations in a little more than two minutes into the stop while he questioned defendant and Zepeda about their identification. (R204:40:18-42:36). In fact, Sergeant Mangelson believed the tires contained drugs "when [he] first seen them" (R 63-62, 72; 201:39).

Even though at this point he had probable cause to believe that defendant and Zepeda were transporting illegal drugs, Sergeant Mangelson, out of an abundance of caution, "sought to confirm or dispel his suspicion by asking where [defendant and Zepeda] were going and what the tires were for" (R. 63; 200:9; 16-17). Zepeda, a 17-year-old high school student from Las Vegas, stated that they were going to West Valley for work (R. 63, 71; 201:16). Sergeant Mangelson thought that it was highly suspicious that a 17-year-old high school student was traveling from Las Vegas to West Valley for work when school was in session. (R. 201:19). He also noticed that the two men had hardly any luggage for such a long trip. (R. 63; 201:19). Additionally, neither defendant nor Zepeda could explain what the tires were for. (R. 63; 201:17).

"All of these factors," the trial court found, "combined to establish Sergeant Mangelson's extremely strong suspicion and established a high probability that illegal drugs were hidden inside of the tires." (R. 63-63). Case law supports the court's conclusion. In *Texas v. Brown*, an officer stopped Brown at a checkpoint. *Brown*, 460 U.S. at 733. As he asked for Brown's identification, the officer saw Brown drop a party balloon, knotted about one-half inch from the tip. *Id.* When Brown opened the glove compartment, the officer saw

that it contained several small plastic vials, some loose white powder, and an open bag of party balloons. *Id.* at 734. Based on his experience that narcotics were frequently packaged in small balloons, the officer seized the dropped balloon, which was later found to contain heroin. *Id.* at 734-35. Noting that the process of determining probable cause "is a flexible, common sense standard . . . [that] "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' . . . that certain items *may* be contraband," the Supreme Court held that "it is plain that [the officer] possessed probable cause to believe the balloon in Brown's hand contained an illicit substance." *Id.* at 742 (citing *Carroll*, 267 U.S. at 162) (emphasis added). The Court further noted that "[t]he fact that [the officer] could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer. *Id.* at 743. *See also People v. Hilt*, 698 N.E.2d 233, 235-36 (Ill. Ct. App. 1998) (distinctively knotted, torn baggie, signaling to experienced officer characteristic packaging of crack cocaine, seen in car stopped in early morning hours in area known for drug dealing, established probable cause to search); *State v. Miles*, 775 P.2d 758, 760-61 (N.M. Ct. App. 1989) (plain view exception justified seizure from automobile of small wooden box whose incriminating nature was immediately apparent where its size and markings indicated that it contained pipe and marijuana).

Here, defendant had designed two unique and distinctive packages to contain drugs. The packages were also rigorously constructed of materials known and used in the illegal narcotics trade to prevent the escape of any odor associated with their contents. To the

experienced investigator the specialized, excessive treatment applied to these otherwise commonplace objects readily betrayed their illicit character and announced that defendant was not using them as they were plainly intended to be used. *See Brown*, 460 U.S. at 746 (Powell, J., concurring) ("We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloons such as the one . . . seized.") In sum, the trial court correctly concluded that "[w]hile Sergeant Mangelson was obtaining information related to the initial purpose of the stop he developed probable cause to believe the occupants of the van were smuggling illegal narcotics" (R70). The court also correctly concluded that "[a]t this point, based on the probable cause that Sergeant Mangelson developed, the scope of the stop expanded from a simple traffic stop to a situation of narcotics trafficking" (R.62). Thus, the trial court concluded that "[i]n order to confirm or dismiss his suspicion Sergeant Mangelson asked [defendant and Zepeda] if they would allow him to have a closer look at the tires (R. 62).

As stated below, a police officer may conduct a warrantless search if he has probable cause that a vehicle contains illegal substances and exigent circumstances justify the search. *See* Aple. Br. at E. Because those criteria existed here, the officer had a legal right to search defendant's van, even if he did not have defendant's consent. Nevertheless, the officer's search of the tires was independently justified by defendant's voluntary consent.

C. Defendant's consent to a search of the tires was voluntary and was not obtained through exploitation of any police illegality.

Defendant claims that "[e]ven assuming that Sergeant Mangelson was grounded in reasonable suspicion" to detain defendant in order to confirm or dispel his suspicion that the

tires contained drugs, defendant's consent that Sergeant Mangelson look at the tires was "coerced and/or involuntary." Aplt. Br. at 20-21.

"A consent is valid only if '(1) [t]he consent was given voluntarily, and (2) the consent was not obtained by police exploitation of the prior illegality.'" *Hansen*, 2002 UT 125, ¶ 47 (quoting *State v. Thurman*, 846 P.2d 1256, 1262 (Utah 1993)). It is undisputed that defendant gave Sergeant Mangelson his consent to "look" at the tires (R. 62; 201:65; 204:42:46-55). And because, as established above, Sergeant Mangelson was justified in further detaining defendant in order to confirm or dispel his suspicion that the tires contained drugs, the only remaining issue is whether defendant's consent was voluntary.

To be voluntary, consent must be obtained without "duress or coercion, express or implied." *State v. Bisner*, 2001 UT 99, ¶ 47, 37 P.3d 1073. Factors relevant to determining whether the consent was voluntarily given are: "1) the absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the owner of the [property]; and 5) the absence of deception or trick on the part of the officer." Id. (citations omitted) (alternation in original).

Applying these factors under the totality of the circumstances, the trial court correctly concluded that defendant's consent was voluntary. As the court noted, the videotape is the most probative evidence of defendant's voluntary consent and that there was no show of force: "Sergeant Mangelson was alone at the time of the request to search, he did not have his hand on his sidearm, his voice was calm and even, in short, nothing in Sergeant Mangelson's demeanor could have been construed as a show of force" (R. 61; 204:40:18-

44:23). The videotape reveals that Sergeant Mangelson merely asked if he could examine the tires: "How about lookin' at [the tires]? Do you mind if I look at it?" (R. 204:42:36-38). In response to that request, defendant promptly exited the van and opened the back doors (R. 204:42:46-55). Defendant himself testified that by opening the van door, he was giving Sergeant Mangelson consent (R. 201:65). He also acknowledged that Sergeant Mangelson never threatened him if he did not allow him to search, that the officer never claimed a legal right to search, and that he never showed any force to persuade him to open the van (R. 201:70-71). Only when defendant began to close the doors and Sergeant Mangelson told him in a loud voice to open them up did he assert that the officer showed any force (R. 201:71). In the absence of any showing that Sergeant Mangelson exercised duress or coercion, the trial court correctly concluded that defendant's consent to search the tires was voluntary.

D. Defendant consented to a physical examination of the tires.

Defendant claims that the trial court erred in finding that "defendant consented to the search by allowing Sergeant Mangelson to look at the tires." Aplt. Br. at 23. Particularly, defendant argues that consent to "look" at the tires did not encompass consent to physically examine them. Because defendant's consent to "look" at the tires reasonably included handling them, defendant's claim fails.[6]

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[6] Defendant also argues that he revoked his consent when he attempted to shut the back door of the van. Aplt. Br. at 24. Defendant admits, however, that he closed the door only because he thought that Sergeant Mangelson "had already finished" looking at the tires. (R. 201:66). This admission negates his argument that he was affirmatively withdrawing his former consent. *See State v. Stephens*, 946 P.2d 734, 736 (recognizing that consent is judged by an objective reasonableness standard).

"'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" *State v. Castner*, 825 P.2d 699, 705 (Utah Ct. App. 1992) (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). "Although a suspect may limit the scope of consent, if the officer could reasonably understand the consent to extend to a particular container, 'the Fourth Amendment provides no grounds for requiring a more explicit authorization.'" *State v. Stephens*, 946 P.2d 734, 736 (Utah Ct. App. 1997) (quoting *Jimeno*, 500 U.S. at 252).

In *Stephens*, a police officer, while making a traffic stop, observed Stephens make several "'stuffing' movements toward the passenger side of the front seat." *Id.* at 735. The officer asked Stephens if he had hidden any drugs or weapons under the seat. *Id.* Stephens replied, "No, you're free to *look* if you want." *Id.* (emphasis added). The officer explained to Stephens that because of what he observed, he would "like to 'check' under the front seat." *Id.* Stephens replied, "Go right ahead." *Id.* The officer discovered a leather case under the front seat that contained drugs and drug paraphernalia. *Id.* Stephens sought to suppress the drugs, arguing that permission to "look" or "check" under the seat did not allow the officer to search the contents of the leather case. *Id.*

The *Stephens* court framed the question as whether, "defendant's authorization to 'look' and [the officer's] failure to ask permission to specifically 'search,' effectively excluded the contents of the leather case from the scope of defendant's consent." *Id.* at 736. The Court began its analysis by noting that under *Jimeno*, it "need not consider the limiting

effect that defendant may have subjectively attached both to his own use of the word 'look' and [the officer's] request to 'check' under the front seat." *Id.* After considering the circumstances of the encounter, the court concluded that Stephen's "general consent to 'look' or 'check' under the front seat for weapons or drugs extended to the contents of the leather case." *Id.* One fact that the court found particularly telling was that Stephens "did not place any limits on the scope of his consent." *Id.* at 737.

In support of its holding, the *Stephens* court cited *Untied States v. McSween*, 53 F.3d 684, 688 (5th Cir. 1995), which stated that an officer's request to look in a vehicle is "effectively" asking for permission to search. *See also United States v. Crain*, 33 F.3d 480, 484 (5th Cir. 1994) (holding "that an individual's consent to an officer's request to 'look inside' his vehicle is equivalent to general consent to search the vehicle and its contents").

Here, Sergeant Mangelson asked defendant if he could look at the tires in the back of the van. In response, defendant got out of the passenger's seat and opened the back door. Thereafter, Sergeant Mangelson physically handled the tires. Defendant did not object to this behavior nor seek to clarify the limits to his consent. Indeed, defendant's demeanor during the officer's examination of the tires suggests that he readily acquiesced in the search (R. 204:42:46-44:50). Therefore, under the objective reasonableness standard, Sergeant Mangelson stayed within the scope of defendant's consent.

As a result of defendant's consent to search, Sergeant Mangelson also developed further probable cause that the tires contained illegal substances. The tires felt solid, like "concrete," heavy, and totally incompressible (R. 200:12; 201:20). The "echo" test,

performed with a stethoscope, revealed that the tires were solid (R. 65; 200:15; 201:22). Cutting away a little bit of the shrink wrap, the officer found particles of foam around the tire rim (R. 201:22). During this time, defendant and Zepeda began to act uncomfortably and were unable to adequately answer Sergeant Mangelson's questions about the tires. All of these facts only made the officer more certain that there was contraband in the tires: "[I]f you figure probable cause is 51 percent, I think I'm probably at 95 percent at this point that there's drugs in those tires" (R. 201:26).

E. No separate exigency requirement applies to a search of an automobile stopped on the highway.

Defendant claims that the trial court "erred in failing to analyze whether exigent circumstances justified the warrantless search of the van." Aplt. Br. at 26.[7] More particularly, defendant argues that because the van "was not movable and [Zepeda and defendant] were both arrested," "exigent circumstances did not exist" when the tires were finally opened. Aplt. Br. at 28. Defendant's claim lacks merit.

Warrantless searches are per se unreasonable under the United States Constitution. *Katz v. United States*, 389 U.S. 347, 357 (1967). This rule, however, is "subject . . . to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. One such exception to the warrant requirement is the automobile exception. *Carroll*, 267 U.S. 132

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[7] Based on the evidence that exigent circumstances existed in the circumstances of this stop, any argument that the trial court failed to make explicit findings need not be considered. "In cases where there is sufficient evidence in the record to support a ruling, this court will uphold it even where the trial court fails to make explicit factual findings." *State v. Martin*, 1999 UT 72, ¶ 7, 984 P.2d 975 (citing *State v. Ramirez*, 817 P.2d 774, 787- 88 (Utah 1991)).

(1925). "A warrantless search is permissible under the automobile exception if (1) the officer conducting the search had probable cause to believe that the vehicle in question contain[ed] property that the government may properly seize; and (2) exigent circumstances justified the search." *United States v. Castelo*, 415 F.3d 407, 412 (5th Cir. 2005) (citations omitted).

"Under Utah law '[e]xigent circumstances exist when the car is movable, the occupants are alerted [to the presence of law enforcement], and the car's contents may never be found again if a warrant must be obtained.'" *State v. Parra*, 972 P.2d 924, 926 (Utah App. 1998) (quoting *State v. Anderson*, 910 P.2d 1229, 1237 (Utah 1996)). *See also Maryland v. Dyson*, 527 U.S. 465, 467 (1999); *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

In *Anderson*, the Utah Supreme Court upheld a warrantless station house search of a vehicle after an earlier roadside search which was held to be justified by exigent circumstances at the initial stop. *Anderson*, 910 P.2d at 1238-38. The court noted that "exigent circumstances are to be weighed only at the time the vehicle is seized by police." *Id.* at 1237 (citing with approval *Texas v. White*, 423 U.S. 67, 68 (1975) and *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)). The court went on to state that "[i]n these cases, the [United States Supreme] Court reasoned that because the police could have searched the vehicle immediately after the arrest, 'there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.'" *Id.* at 1238. (citing *Chambers*, 399 U.S. at 52, and *White*, 423

U.S. at 68). "Thus, as long as police had probable cause to search and exigent circumstances existed at the time the automobile was stopped and seized, a warrantless search conducted sometime later at a secure location would not offend the Fourth Amendment." *Id.* *See Parra*, 972 P.2d at 926 (upholding later warrantless search at a secure location even though Parra had been placed in custody where Parra's vehicle was "movable" at the time the police officer pulled him over); *United States v. Gallman*, 907 F.2d 639, 641 (7th Cir. 1990) (holding automobile exception applicable even though defendant was arrested and officer had keys to his vehicle, because such circumstances "do not make [the vehicle] less mobile").

Anderson, *Parra*, and *Gallman* are dispositive of this case. It is undisputed that defendant was alerted to the presence of a police officer and that defendant's van was mobile when Sergeant Mangelson pulled it over. Further, the van's contents "[might] never [have be[en] found again if a warrant [had to] be obtained." *Parra*, 972 P.2d at 926 (internal quotation marks and citation omitted). Therefore, exigent circumstances existed. In addition, because "[Sergeant Mangelson] had probable cause to search and exigent circumstances existed at the time [defendant's van] was stopped and seized, [the] warrantless search conducted sometime later at [the Highway Patrol Station, which resulted in the discovery of almost 40 pounds of marijuana, did] not offend the Fourth Amendment." *Id.* (internal quotation marks and citation omitted).

In sum, probable cause and exigent circumstances justified not only the search of the tires when defendant's van was initially stopped, but also when it was later taken to the station house and then to a shop where the tires were opened.

CONCLUSION

Based on the foregoing, defendant's conviction should be affirmed.

RESPECTFULLY submitted on 3rd April, 2006.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, this 3rd day of April, 2006 to:

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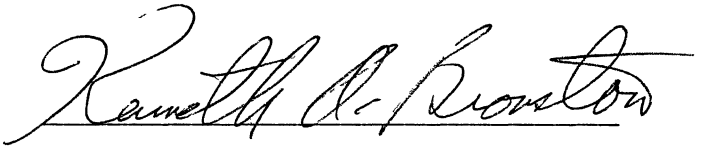

Addenda

Addendum A

UNITED STATES CONSTITUTION

Amendment IV. Search and seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

MOTOR VEHICLES

§ 41-6-55. Overtaking and passing vehicles proceeding in same direction

(1) On any highway:

(a) the operator of a vehicle overtaking another vehicle proceeding in the same direction:

(i) shall, except as provided under Section 41-6-56, pass to the left at a safe distance; and

(ii) may not drive to the right side of the roadway until safely clear of the overtaken vehicle;

(b) the operator of an overtaken vehicle:

(i) shall give way to the right in favor of the overtaking vehicle; and

(ii) may not increase the speed of the vehicle until completely passed by the overtaking vehicle.

(2) On a highway having more than one lane in the same direction, the operator of a vehicle traveling in a left general purpose lane:

(a) shall, upon being overtaken by another vehicle in the same lane, yield to the overtaking vehicle by moving safely to a lane to the right; and

(b) may not impede the movement or free flow of traffic in a left general purpose lane or except:

(i) when overtaking and passing another vehicle proceeding in the same direction in accordance with Subsection (1)(a);

(ii) when preparing to turn left or taking a highway split or exit on the left;

(iii) when responding to emergency conditions;

(iv) to avoid actual or potential traffic moving onto the highway from an acceleration or merging lane; or

(v) when following direction signs that direct use of a designated lane.

Laws 1941, c. 52, § 45; Laws 1983, c. 337, § 3; Laws 1985, c. 194, § 1; Laws 1987, c. 138, § 54; Laws 2002, c. 74, § 2, eff. May 6, 2002.

Codifications C. 1943, § 57-7-122.

§ 58-37-8. Prohibited acts—Penalties

(1) Prohibited acts A—Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B—Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), includ-

ing less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (4)(c) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(3) Prohibited acts C—Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled

substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D—Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii);

(x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the

penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under Subsection (2)(g) or this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense.

(d)(i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6)(a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

Laws 1971, c. 145, § 8; Laws 1972, c. 22, § 1; Laws 1977, c. 29, § 6; Laws 1979, c. 12, § 5; Laws 1985, c. 146, § 1; Laws 1986, c. 196, § 1; Laws 1987, c. 92, § 100; Laws 1987, c. 190, § 3; Laws 1988, c. 95, § 1; Laws 1989, c. 50, § 2; Laws 1989, c. 56, § 1; Laws 1989, c. 178, § 1; Laws 1989, c. 187, § 2; Laws 1989, c. 201, § 1; Laws 1990, c. 161, § 1; Laws 1990, c. 163, §§ 2, 3; Laws 1991, c. 80, § 1; Laws 1991, c. 198, § 4; Laws 1991, c. 268, § 7; Laws 1995, c. 284, § 1, eff. May 1, 1995; Laws 1996, c. 1, § 8, eff. Jan. 31, 1996; Laws 1997, c. 64, § 6, eff. May 5, 1997; Laws 1998, c. 139, § 1, eff. May 4, 1998; Laws 1999, c. 12, § 1, eff. May 3, 1999; Laws 1999, c. 303, § 1, eff. May 3, 1999; Laws 2003, c. 10, § 1, eff. May 5, 2003; Laws 2003, c. 33, § 6, eff. May 5, 2003; Laws 2004, c. 36, § 1, eff. March 15, 2004.

Addendum B

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IN THE FOURTH JUDICIAL DISTRICT COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. LUIS PEREZ LLAMAS, Defendant.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** Case No. 031600159 JUDGE STEVEN L. HANSEN

The defendant, Luis Perez Llamas, through his attorney, Joseph Jardine and the State of Utah though, Jared Eldridge, Juab County Attorney, submitted memorandums and oral argument to this Court. After considering the arguments of the attorneys and all relevant memoranda, this Court now makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On October 14, 2003 Sergeant Mangelson of the Utah Highway Patrol observed the van the defendant, Luis Perez Llamas, was riding in driving in the left lane of I-15. Sergeant Mangelson also observed three cars pass the van in the right lane of I-15. Due to the van's failure to pull to the right to allow the cars to pass, Sergeant Mangelson stopped the van for a left lane violation.

2. Upon stopping the van, Sergeant Mangelson approached the passenger side of vehicle. As Sergeant Mangelson approached the left side of the van, he observed two tires lying in the back of the van. Sergeant Mangelson also noticed that the tires were too big for the van and obviously did not belong to the van. Additionally, Sergeant Mangelson noticed that the tires were wrapped in shrinkwrap.

3. When Sergeant Mangelson requested the driver's license and registration, the driver produced a high school identification card and said that he only had a permit to drive, not a license.

4. The defendant, Luis Perez Llamas, was riding in the passenger seat.

5. About the time Sergeant Mangelson initiated conversation with the driver, he noticed a roll of shrinkwrap, which led him to believe the occupants of the van had wrapped the tires to conceal the odor of illegal narcotics. Additionally, Sergeant Mangelson observed a piece of cardboard with dried spray foam on it in a circular pattern that appeared to match the circumference of the tires..

6. In Sergeant Mangelson's 37 years of experience in drug interdiction he has seen on many occasions drugs concealed inside of tires.

7. Every time Sergeant Mangelson has seen dried spray foam in a vehicle he has also found illegal narcotics concealed with spray foam.

8. The observations Sergeant Mangelson made, caused him to be highly suspicious that the occupants of the van were trafficking illegal narcotics.

9. After examining the driver's identification, which was from Desert Pines High School in Las Vegas, Nevada, Sergeant Mangelson began questioning the occupants of the van about the items he had observed in the back of the van.

10. The driver answered some of Sergeant Mangelson's questions and Mr. Perez Llamas, who speaks very little English, responded to some of Sergeant Mangelson's questions through the driver, who acted as an interpreter.

11. Sergeant Mangelson asked the occupants where they were going and what the tires were for. The driver of the vehicle responded by saying they were coming from Las Vegas and going to West Valley for work.

12. Sergeant Mangelson thought the story of a 17 year old going to West Valley for work was suspicious because he should have been in school.

13. Sergeant Mangelson also observed the lack of luggage which he thought was strange for people who were a long way from home looking for work.

14. Sergeant Mangelson also considered that I-15 is a known drug corridor and that Las Vegas is a source city for illegal drugs.

15. Sergeant Mangelson asked if he could look at the tires in the back of the van. Mr. Perez Llamas responded to this question by getting out of the van and opening the back doors of the van. Mr. Perez Llamas agreed that he gave Sergeant Mangelson permission to look at the tires.

16. Ultimately, Sergeant Mangelson discovered approximately 40 pounds of marijuana concealed inside of the tires.

CONCLUSIONS OF LAW

1. Sergeant Mangelson had reasonable suspicion to believe a violation of U.C.A. § 41-6-55 occurred. Therefore, the initial stop of the van was justified at its inception.
2. While Sergeant Mangelson was obtaining information related to the initial purpose of the stop he developed probable cause to believe the occupants of the van were smuggling illegal narcotics.
3. Based on the probable cause that Sergeant Mangelson developed, the scope of the stop expanded from a simple traffic stop to a situation involving narcotics trafficking.
4. Even though Sergeant Mangelson had probable cause to search the tires and could have inspected them even over the objection of the occupants, he sought to obtain additional justification for a search by asking for consent.
5. This Court finds that Mr. Perez Llamas consented to allow Sergeant Mangelson to look at the tires.
6. Additionally, after considering the totality of the circumstances, this Court finds, by a preponderance of the evidence, that Mr. Perez Llamas' consent for Sergeant Mangelson to look at the tires was without coercion or duress and was given voluntarily.
7. This Court finds that the stop and eventual search of the minivan in this case were reasonable according to both the United States and Utah Constitutional requirements.
8. Furthermore, this Court finds that the search of the tires in this case was constitutionally reasonable.

ORDER

IT IS NOW THEREFORE ORDERED, that the Defendant's Motion to Suppress marijuana discovered inside of the tires in this case is denied.

DATED this 14 day of July, 2004.

BY THE COURT

STEVEN L. HANSEN
Fourth District Court Judge

Addendum C

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. LUIS PEREZ-LLAMAS, Defendant.	MEMORANDUM DECISION Case No. 031600159 Date: May 5, 2004 Judge Steven L. Hansen

Before the Court is the Defendant's Motion to Suppress. The Court, having reviewed and considered all relevant memoranda, now makes the following ruling:

STATEMENT OF FACTS

1. On October 14, 2003, Sergeant Mangelson of the Utah Highway patrol stopped a van for an alleged left lane violation. Sergeant Mangelson testified at the preliminary hearing that he observed three cars pass the van on the right. Tr. P. 8, L. 6.
2. Sergeant Mangelson initiated pursuit and signaled the van to pull over. Upon stopping, Mangelson approached the passenger side of the vehicle. Sergeant Mangelson testified, "As I got to the side of the vehicle I noted a couple of tires that were lying in the back of the van." Suppression Hearing (hereinafter "SH"), p. 13. Sergeant Mangelson also noticed that the tires were too big for the van and obviously did not belong to the van. SH, p. 19-20. Additionally, the officer testified that the tires were wrapped in shrinkwrap. SH, p. 14.
3. Sergeant Mangelson asked for a driver's license and registration. The driver produced a high school identification and said that he only had a permit to drive, not a license. The passenger, Luis Perez-Llamas was riding in the passenger seat.
4. After examining the driver's I.D., but before returning it, Mangelson began questioning

the occupants of the van regarding some packaging that he saw in the back of the van. Defendant speaks very little English, and most of the responses were either by the driver, or through him acting as an interpreter. The driver responded that there were some tires in the back of the van. Mangelson asked if he could look at the tires. In response to his request Defendant got out of the car and opened the back door of the van.

5. Mangelson proceeded to examine the tires and continued his questioning of the occupants. After Mangelson looked at the tires, he returned to his cruiser. Defendant then closed the back doors of the van. Mangelson then told the Defendant to keep the doors open. Defendant then opened the doors. Mangelson returned with a stethoscope. He ordered Defendant and the driver to the shoulder of the road while he performed an echo test of the tire.

6. After that, Mangelson ordered the driver to get into his cruiser and told Defendant to get in the van and follow him to the police station. About 15 minutes later they arrived at the station. Other officers were called on the scene and began searching the van. There was some discussion regarding the tires. The air pressure of the tires was taken. Eventually it was decided to arrest the driver and defendant. After they were arrested, Mangelson took the tires down to a local tire shop to have them "broken down." Upon removing the tires from the rims, contraband was uncovered. No warrant was sought to search the van or the tires.

ANALYSIS AND CONCLUSION OF LAW

I. The Search of the Vehicle Following the Initial Stop did not Violate the Fourth Amendment of the Constitution.

The Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution guarantee the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." It is important to note, "what the Constitution forbids is not all searches and seizures but unreasonable searches and seizures." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (internal citation omitted).

1. The stop was justified because a violation of Utah law occurred in Sergeant Mangelson's presence.

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In evaluating whether or not a search and seizure performed at a traffic stop is constitutionally reasonable the Court must conduct a two step inquiry. First, was the police officer's action justified at its inception, and second, was the resulting detention reasonably related in scope to the circumstances that justified the stop." *State v. Lopez*, 873 P.2d 1127, 1131-32 (Utah 1994).

Under Utah statutory and case law, "a police officer is constitutionally justified in stopping a vehicle if the stop is, 'incident to a traffic violation committed in the officer's presence.'" *Id.* (quoting *State v. Talbot*, 792 P.2d 489, 491 (Utah Ct. App. 1990)). "As long as an officer suspects that the 'driver is violating any one of the multitude of applicable traffic and equipment regulations,' the police officer may legally stop the vehicle." *State v. Chevre*, 2000 UT App. 6 (quoting *State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) (quoting *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S. Ct. 1391, 1400.))

In this case, Sergeant Mangelson testified that he observed a vehicle driving in the left lane on I-15 and the vehicle failed to move to the right when three other cars came up from behind. Sergeant Mangelson further testified that he observed three other cars move to the right lane and pass the minivan. PH p. 8. l. 2-8. Failing to move from the left lane when another car comes up from behind at a faster rate of speed is a violation of U.C.A. § 41-6-55. Mr. Zepeda, however, testified that cars did not pass him that day, but that he was doing the passing. SH p. 54. l. 25. This Court finds that although there is a dispute in the facts, that Sergeant Mangleson's testimony indicates he had a reasonable suspicion that a traffic violation was taking place. Since Sergeant Mangelson observed this violation of Utah state law, he was justified to stop the vehicle and detain the driver long enough to investigate the suspected violation. The Court finds the first prong of the inquiry is satisfied; this traffic stop was justified at its inception.

The Utah Supreme Court recently stated, "once the purpose of the initial stop is concluded . . . the person must be allowed to depart. 'Any further temporary detention for investigative questioning after [fufilling] the purpose for the initial stop' constitutes an illegal seizure, unless the officer has probable cause or a reasonable suspicion of a further illegality." *State v. Hansen*, 2002 UT 125 ¶ 31 (citations omitted).

In this case, after Sergeant Mangelson stopped the minivan and as he walked beside the

van to talk with the occupants he noticed two large implement tires that obviously did not belong to the van that were lying in the back of the van. Sergeant Mangelson noticed that these tires were wrapped in shrinkwrap which in his words, "stood out like a neon light to me." (SH p. 49. Shortly after noticing the suspicious tires and about the time he initiated conversation with the driver of the vehicle, Sergeant Mangelson also noticed a roll of shrinkwrap, which led him to believe the occupants of the van had wrapped the tires themselves in order to conceal the odor of illegal narcotics and also a piece of cardboard with dried spray foam on it in a circular pattern matching the circumference of the tire rims. Sergeant Mangelson has seen on many occasions drugs concealed inside of tires, in fact he testified that it is one of the more common methods for concealing illegal narcotics. Sergeant Mangelson also testified that every time he has seen dried spray foam in a vehicle he has also found illegal narcotics concealed with spray foam. Based on Sergeant Mangelson's 37 years of experience in drug interdiction and the observations he made in this case he was highly suspicious that the occupants of the van were trafficking illegal narcotics.

The observations that Sergeant Mangelson initially made meet the level of reasonable articulable suspicion and constitute probable cause of criminal activity. However, Sergeant Mangelson sought to confirm or dispel his suspicion by asking where the occupants were going and what the tires were for. The driver, Reuben Zepeda responded by saying that they were headed to West Valley for work and he also provided Sergeant Mangelson a high school I.D. card from Desert Pines High School in Las Vegas as identification for himself. Sergeant Mangelson thought that the story of a 17 year old going to West Valley for work was suspicious because the young man should have been in school. Sergeant Mangelson noticed the lack of luggage which he thought was strange for people on a long trip away from home to look for work. Additionally, the inability of the occupants to explain what the tires were for was very suspicious. Sergeant Mangelson also considered that the minivan was traveling a known drug corridor and that it was coming from a city, that in his experience, is a source city for illegal narcotics. *See State v. Poole*, 871 P.2d 531, 534 (Utah 1994) (case involving Serageant Mangelson stating that I-15 is a known trafficking route).

All of these factors combined to establish Sergeant Mangelson's extremely strong suspicion and established a high probability that illegal drugs were hidden inside of the tires. In

fact, Sergeant Mangelson testified that as soon as he saw the tires and how they were wrapped up, he knew there was something inside of them. SH, p. 39.

At this point, based on the probable cause that Sergeant Mangelson developed, the scope of the stop expanded from a simple traffic stop to a situation involving narcotics trafficking. In order to confirm or dismiss his suspicion Sergeant Mangelson asked the occupants if they would allow him to have a closer look at the tires. The occupants agreed and exited the vehicle, went to the back and Mr. Perez Llamas opened the back doors up for Sergeant Mangelson.

In this case both prongs of the required inquiry have been satisfied, the stop was justified at its inception and the detention was reasonably related to the purpose of the stop and the articulable suspicion and probable cause developed by Sergeant Mangelson while he was obtaining information related to the initial reason for the stop The Court finds that the stop and the eventual search of the minivan in this case were reasonable according to both the United States and Utah Constitutional requirements.

2. Sergeant Mangelson obtained consent to look at the tires.

Even though Sergeant Mangelson had probable cause to search the tires and could have inspected them even over the objection of the occupants, he sought to obtain the additional justification by asking consent to allow him to look closer at the tires.

The Utah Supreme Court in *Hansen* has clarified the examination that should take place in order to determine whether consent to search was valid. 2002 UT 125, ¶ 47. "A consent is valid only if '(1) the consent was given voluntarily, and (2) the consent was not obtained by police exploitation of the prior illegality.'" *Id.* (citation omitted)

a. The consent to search was voluntary.

The Court must first determine, based on the totality of the circumstances, whether the defendant consented to the search before it can address whether the consent was voluntary. *Id.* at ¶ 48.

A review of the video tape of the traffic stop reveals that shortly after Sergeant Mangelson asked for permission to look at the tires, Mr. Perez Llamas got out of the van, walked to the back and opened the doors for him. Mr. Perez Llamas also agreed at the suppression hearing that he gave Sergeant Mangelson permission to look at the tires. SH p. 65, 67.

Once a factual determination has been made that consent was given, the analysis focuses on whether the consent was voluntary. The Utah Supreme Court clarified the analysis of voluntariness by stating:

> The appropriate standard to determine voluntariness is the totality of the circumstances test, and the burden of proof is by preponderance of the evidence. Under the totality of the circumstances test, a court should carefully scrutinize both the details of the detention, and the characteristics of the defendant. The totality of the circumstances must show consent was given without duress or coercion. In other words, a person's will cannot be overborne, nor may "his capacity for self-determination [be] critically impaired."

Id. at ¶ 57 (citations omitted). The court then went on to list several factors that may show the lack of duress or coercion. These factors are: (1) the absence of a claim of authority to search by the officers; (2) the absence of an exhibition of force by the officers; (3) a mere request to search; (4) cooperation by the owner of the vehicle; and (5) the absence of deception or trick on the part of the officer. *Id.*

In considering these factors, the Court finds the most probative evidence is the video tape of the stop. A review of the video tape shows that Sergeant Mangelson made no claim of authority to look at the tires and in fact Mr. Perez Llamas agreed that Sergeant Mangelson did not make any claim of authority. SH, p. 71.

The video also shows there was no show of force. Sergeant Mangelson was alone at the time of the request to search, he did not have his hand on his sidearm, his voice was calm and even, in short, nothing in Sergeant Mangelson's demeanor could have been construed as a show of force. Mr. Perez Llamas agreed at the suppression hearing that Sergeant Mangelson was alone and that there were no threats or show of force when he requested permission to look at the tires. Mr. Perez Llamas did testify that the only think that even came close to a show of force was after Sergeant Mangelson first looked at the tires, he walked back to his car momentarily and when he did that Mr. Perez Llamas began to close the door but Sergeant Mangelson yelled something to the effect of "don't close it." SH, p. 68.

The video reveals that Sergeant Mangelson merely made a request to search. Sergeant Mangelson simply asked if he could take a closer look at the tires. The words he chose, the tone of voice he used and his body language only suggest that this was a request to search and not a demand or an order.

The video also shows that Mr Perez Llamas cooperated with Sergeant Mangelson He got out of the van, came to the back and opened the doors so Sergeant Mangelson could inspect the suspicious tires Mr Perez Llamas agreed that in fact he did give Sergeant Mangelson permission to look at the tires and that he opened the doors for him SHIP

Lastly, there is no evidence that Sergeant Mangelson used any deception or trickery in order to persuade Mr Perez Llamas to consent to the search.

The totality of the circumstances surrounding Mr Perez Llamas' consent to search do not reveal any circumstances that would have overridden his will or interfered with his capacity for self-determination The Court finds by a preponderance of the evidence that Mr Perez Llamas's consent to look at the tires was without coercion or duress and was given voluntarily Thus, the search of the tires was constitutionally reasonable.

CONCLUSION

This Court denies the defendant's Motion to Suppress and finds the evidence was discovered pursuant to a constitutionally reasonable search. The State is to prepare an order consistent with this ruling and submit it for the Court's signature

DATED this 6 day of May, 2004.

BY THE COURT

STEVEN L HANSEN, JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 031600159 by the method and on the date specified.

METHOD	NAME
Mail	JARED W ELDRIDGE ATTORNEY PLA 160 N MAIN ST SUITE 217 NEPHI, UT 84648
Mail	JOSEPH JARDINE ATTORNEY DEF 39 EXCHANGE PLACE, SUITE 100 SALT LAKE CITY UT 84111

Dated this 6 day of May, 2004.

Deputy Court Clerk

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